STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff–Appellee–Cross-Appellant,<br><br>v<br><br>ALEXANDER JEREMY STEANHOUSE,<br><br>Defendant–Appellant–Cross-Appellee.<br><br>_____/ | Supreme Court No. 152849<br><br>Court of Appeals No. 318329<br><br>Wayne Circuit Court No. 11-011939-FC |
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff–Appellee–Cross-Appellant,<br><br>v<br><br>MOHAMMAD MASROOR,<br><br>Defendant–Appellant–Cross-Appellee.<br><br>_____/ | Supreme Court No. 152946–8<br><br>Court of Appeals Nos. 32280–2<br><br>Wayne Circuit Court Nos. 14-000857-FC<br>14-000858-FC<br>14-000869-FC |

**BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

**ORAL ARGUMENT REQUESTED**

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Under MCL 8.5, this Court must preserve applications of statutes that are not invalid. Mandatory guidelines do not violate the Sixth Amendment when the guidelines are scored without judicial fact-finding. May this Court render the guidelines advisory even where mandatory guidelines would result in no Sixth Amendment violation?

   The People's answer: No.

   Steanhouse's answer: No.

   Masroor's answer: Yes.

   Amicus' answer: No.

   Trial courts' answers: Did not answer.

   Court of Appeals' answers: Did not answer.

2. It appears that this Court in *Lockridge* intended to make the guidelines advisory in all cases. Do *stare decisis* principles present an obstacle to overruling that remedy?

   The People's answer: Because this Court did not intend to impose an always-advisory system, *stare decisis* is not implicated.

   Steanhouse's answer: No.

   Masroor's answer: Agree with the People.

   Amicus' answer: No.

   Trial courts' answers: Did not answer.

   Court of Appeals' answers: Did not answer.

3. The trial courts were aware that under the state of the law at the time they passed sentence, they were required to impose a proportionate sentence according to *Milbourn*. Is a *Crosby* remand appropriate to ensure the trial court followed existing law when it passed sentence?

   The People's answer: No.

   Defendants' answer: No.

   Amicus' answer: No.

   Trial courts' answers: Did not answer.

   Court of Appeals' answers: Yes.

4. The standard of reasonableness review of sentences has long been proportionality under *Milbourn*. Nothing in *Lockridge* gave this Court any reason to abandon that standard. Should this Court nonetheless set *Milbourn* aside and adopt a new standard for reasonableness?

   The People's answer: Yes.

   Steanhouse's answer: No.

   Masroor's answer: Yes.

   Amicus' answer: No.

   Trial courts' answers: Did not answer.

   Court of Appeals' answer in *Steanhouse*: No.

   Court of Appeals' answer in *Masroor*: Yes.

## STATUTES INVOLVED

**MCL 8.5 provides:**

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

**MCL 769.34 provides in part:**

> (2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. . . .
>
> (3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. . . .
>
> * * *
>
> (10) If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

## INTRODUCTION

Michigan's Legislature has limited the ability of courts, including this Court, to strike down *all* applications of statutes based on a finding of invalidity in *some* applications. In spite of this restriction, in *People v Lockridge*, 498 Mich 358 (2015), this Court struck down *all* applications of Michigan's laws providing for mandatory sentencing guidelines, even as it acknowledged (and indeed held) that *some* applications of mandatory sentencing guidelines do not violate the Constitution. Because the *Lockridge* remedy violated Michigan's severability statute, MCL 8.5, the Attorney General asks this Court to vacate the remedy portion of *Lockridge*, and hold that the sentencing guidelines are advisory *only* when judge-found facts are used to score offense variables. But if this Court agrees with the Wayne County Prosecutor that the *Lockridge* remedy was in fact to make the guidelines advisory only in cases in which judge-found facts were used to score the guidelines, then this Court should clarify that this was *Lockridge*'s holding.

This Court has also asked two questions about review of departure sentences. The court below in *Steanhouse* erred in ordering a remand, because the trial court was aware at the time it sentenced Steanhouse that it was required to impose a sentence that was proportionate under *People v Milbourn*, 435 Mich 630 (1990). *Milbourn* was the law before Michigan had mandatory guidelines, it remained the law after guidelines remained mandatory, and this Court should hold (and the courts below should have held) that it remains the law today. Although it is true that mandatory guidelines *added* a requirement that a departure sentence be supported by substantial and compelling reasons to depart, that did not replace

*Milbourn*; it only supplemented it. This Court, the Court of Appeals, and trial courts have been applying *Milbourn* continuously for decades.

Thus, *Steanhouse* erred in two respects regarding this question. First, it erred in assuming that *Lockridge* struck down *Milbourn* proportionality review *sub silentio* with no discussion or argument, and second, it erred in mistakenly assuming the trial court did not know it was required to impose a *Milbourn*-proportionate sentence.

The better interpretation is that, when *Lockridge* struck down the "substantial and compelling reasons" standard, it left in place the *Milbourn* standard that had always been there. Although "reasonableness" may not be the precise best word to capture that standard, that is the best reading of *Lockridge*.

This Court should hold, in compliance with MCL 8.5, that the guidelines are henceforth advisory when scored with judge-found facts and mandatory when scored without judge-found facts. It should hold this whether as a clarification of *Lockridge* or as a partial overruling of it. This Court should further hold that the *Milbourn* standard for departure review that was in place before *Lockridge* remains in place after it. The *Steanhouse* panel below was correct in holding that this is the standard of review of departure sentences, but incorrect in holding that the trial court was unaware of it. We presume that trial courts know and follow the law, and since *Milbourn* was the law when these defendants were sentenced, the trial court presumably knew it was required to impose a *Milbourn*-proportionate sentence. No remand is required.

## COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Attorney General accepts the People's statement of facts.

## ARGUMENT

### I. Because it does not violate the Sixth Amendment to apply MCL 769.34(2) and (3) as written when a defendant's guidelines range is not dependent on judicial fact-finding, courts must apply those sections as written under those circumstances.

In *People v Lockridge*, this Court held that it violates the Sixth Amendment to score offense variables using facts not proven to the jury nor admitted by the defendant, and then to use those offense variables to determine sentencing guidelines that are mandatory on the trial court. 498 Mich at 388–389. But *Lockridge* also correctly recognized that there is no constitutional violation when mandatory guidelines are determined *without* using judge-found facts. *Id.* at 364; see also *id.* at 374–375, 383, 394–395.

Thus, in cases where the guidelines are scored using judge-found facts, a remedy is required. This Court chose, from among several possible remedies, to make the sentencing guidelines advisory, rather than mandatory. *Id.* at 389–392. But when the guidelines are not scored using judge-found facts, no violation occurs when mandatory guidelines constrain the sentencing court's discretion, and no remedy is required or permitted.

MCL 8.5 provides that, "[i]f any . . . application [of an act] to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining . . . applications of the act which can be given effect without the

invalid . . . application, . . . ." While it is proper to make the guidelines advisory in cases where mandatory guidelines would violate the Constitution, that invalidity must not be allowed to affect *valid* applications of Michigan sentencing law.

### A. Neither of the exceptions to MCL 8.5 allows a remedy under which the guidelines are advisory in all cases.

MCL 8.5 admits of two stated exceptions. First, the statute requires severance to preserve valid applications "unless such construction would be inconsistent with the manifest intent of the legislature[.]" Second, it requires severance "provided such remaining portions are not determined by the court to be inoperable." Neither exception applies here.

The first exception of MCL 8.5 does not allow a court to attempt to divine the Legislature's intent regarding severability. Rather, the exception only applies when the Legislature has made this intent "manifest." The Legislature did not choose a different severability rule for MCL 769.34, nor did it make its intent manifest in any other way.

The second exception of MCL 8.5 does not apply here either, because, unlike elsewhere in 8.5, it does not refer to "portions or applications," but only to "remaining portions" (as opposed to applications). Because only some *applications* were invalid, not *portions* of the statute, this exception is not implicated, and the *Lockridge* remedy wrongly barred valid *applications* of § 34(2) and § 34(3).

And even if "applications" were read into the statute, this Court would have had to determine valid applications of § 34(2) and § 34(3) to be "inoperable" without

the invalid applications. The *Lockridge* Court made no such finding. Nor should it have. The sentencing system is perfectly operable if courts apply § 34(2) and § 34(3) when they are constitutional and do not apply them when they are not. A sentencing court needs to add only one more step to the process: after scoring offense variables, the court must determine whether any of those variables were scored greater than 0 using facts not inherent in the verdict (i.e., proved to the jury) or admitted by the defendant. If so, the guidelines are advisory. If not, § 34(2) and § 34(3) *may* be constitutionally applied, and therefore under MCL 8.5 *must* be applied.

### B. In an example that should be followed, the Michigan Court of Appeals has properly severed § 34(10), allowing constitutional applications while barring unconstitutional applications.

Comparison with *People v Conley*, 270 Mich App 301, lv den 477 Mich 931 (2006), is instructive. In that case, the Michigan Court of Appeals concluded that the trial judge violated the defendant's Fifth Amendment right against self-incrimination by imposing a higher sentence because the defendant refused to admit that he was guilty. *Id.* at 314–315. The Court of Appeals then considered MCL 769.34(10), which requires the Court of Appeals to affirm a within-guidelines sentence absent an error in guidelines scoring or the use of inaccurate information at sentencing. *Id.* at 315–316. On its face, this statute would require the court to affirm a within-guidelines sentence (like Conley's) even if the trial court violated constitutional rights (like the right against self-incrimination) because the facts the court relied on were accurate and did not include an error in guidelines scoring.

But the *Conley* court recognized that a statute "cannot authorize action in violation of the federal or state constitutions," so it held that § 34(10) was inapplicable to claims of constitutional error. *Id.* at 316.

If the *Conley* court had, like the *Lockridge* Court, wished to do "the least judicial rewriting of the statute," 498 Mich at 391, as a means to prevent future constitutional violations, it could have simply replaced two words, leaving the portion of the statute to read, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *may* [instead of *shall*] affirm that sentence and *need* [instead of *shall*] not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Thus rewritten, § 34(10) would be just a suggestion to the Court of Appeals, allowing it to reverse within-guidelines sentences not only when there was constitutional error, but also whenever else it felt such reversal was called for.

The *Conley* court did no such judicial rewriting. Although it did not cite MCL 8.5, it hewed to that statute's command in crafting the remedy, holding that § 34(10) simply no longer applied to claims of constitutional error. In other words, where application of § 34(10) would require affirmance of constitutional error, such application would henceforth be invalid, but where § 34(10)'s command could bind the Court of Appeals *without* violating the Constitution, that application would continue to apply in full force. No rewriting was necessary.

A similar remedy is appropriate here. Rather than minimizing judicial rewriting of the statute and relaxing the commands of § 34(2) and § 34(3) in *all* applications, a proper remedy is one that obeys MCL 8.5, and relieves trial courts of only those restraints on discretion that are actually held to be unconstitutional, not those restraints that are undisputedly constitutional.

### C. The *Booker* Court was unconstrained by a severability statute, and the remedy that Court chose was permissible in that case, but it is not available to this Court.

It may be contended that an always-advisory remedy is permissible because that was the remedy chosen by the United States Supreme Court in *United States v Booker*, 543 US 220, 244–268 (2005). Indeed, that was one of the reasons this Court selected the remedy it did. *Lockridge*, 498 Mich at 391 ("We agree that [rendering the guidelines advisory] is the most appropriate remedy. First, it is the same remedy adopted by the United States Supreme Court in *Booker*."). But one simple difference explains why the remedy that was valid in *Booker* is not valid here: the United States Code contains no equivalent to MCL 8.5. The *Booker* Court held (based on case law, not statutes) that its job was to divine the intent of Congress and craft a constitutionally sound sentencing scheme as close to possible to what it believed Congress would have liked. 543 US at 246–249.

Our Legislature has provided otherwise. MCL 8.5 does not ask courts to speculate about legislative intent, but to examine only the "*manifest* intent of the Legislature." (Emphasis added.) Simply, the remedy that was within the *Booker* Court's authority is not within this Court's authority.

### D. Despite disadvantages with a system that is sometimes advisory, MCL 8.5 must be followed unless the Legislature indicates to the contrary.

Admittedly, a bifurcated sometimes-advisory-sometimes-mandatory guidelines system is not without its drawbacks. As noted above, it introduces an additional step, albeit a small one, into a scheme that some already find difficult to navigate. And this system means that some defendants will be sentenced by judges who are bound by the guidelines, and others will be sentenced by judges who are not so bound. But that is an understandable result of a Sixth Amendment violation: if the defendant is sentenced based solely on facts (other than the fact of a prior conviction) found by the jury or admitted by the defendant, then no Sixth Amendment violation has occurred, so the Legislature's intent of creating uniform sentences can be given effect. Under *Lockridge*, the only time mandatory guidelines cannot be applied constitutionally is if a court increases the guidelines range based on its own fact finding, and in that instance this Court's decision in *Lockridge* will mean that the guidelines must be advisory only, averting any potential Sixth Amendment violation. In the end, though, this is similar to the reality that some defendants may be freed from culpability (even if they are in fact guilty) if a constitutional error (such as a speedy-trial violation) occurs during the judicial process. E.g., *Strunk v United States*, 412 US 434, 440 (1973) (describing dismissal as " 'the only possible remedy' " for a denial of a speedy trial).

Because no one can know, ex ante, whether judicial factfinding will occur at sentencing, the result is that a defendant will almost never know before trial, whether, if convicted, the trial court imposing sentencing will be bound by

mandatory guidelines, or free to depart from those guidelines without substantial and compelling reasons. Indeed, it is not uncommon for the parties to present arguments on OV scoring at the sentencing hearing, and the mandatory or advisory nature of the guidelines might not be known until after those arguments are resolved. But that too is a common result of errors that occur during proceedings; for example, a defendant also will not know ex ante if some constitutional error is going to cause a mistrial and subject him to a second trial.

In addition, the bifurcated system may create incentives for savvy defendants, and for those with alert counsel. A defendant knowing that his sentencing judge is "Lenient Larry"[1] may choose not to contest a contestable OV, knowing that, if that OV is scored based on facts not found by the jury, it will render his guidelines advisory, allowing the lenient judge to depart downward. Another defendant, sensing her judge is "Maximum Mike,"[2] may choose to *admit* to OVs under oath, which would remove any Sixth Amendment issue from the application of § 34(3), preventing the judge from departing upward. One can even imagine a sentencing hearing before Lenient Larry, in which the prosecutor seeks to concede multiple OVs at 0 points to keep the guidelines mandatory, while defense counsel argues that at least one should be scored (but only based on a preponderance of the evidence—never based on the jury's verdict) in order to preserve the Sixth Amendment violation. But even this strategic maneuvering is

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[1] See *Lockridge*, 498 Mich at 461 (MARKMAN, J., dissenting); *People v Smith*, 482 Mich 292, 323 (2008) (MARKMAN, J., concurring).

[2] *Id.*

part of the adversarial system, where parties are free to refrain from asserting all of the rights to which they might be entitled and even to willingly waive arguments.

But none of these potential problems render the bifurcated guidelines system "inoperable," nor has the Legislature made "manifest" its intent not to have such a system. Regardless of potential problems the bifurcated system may present, it is the system that invalidates *only* those applications § 34(2) and § 34(3) that this Court has held violate the Sixth Amendment, while continuing to allow those statutes to have effect when they are valid. In short, it has one overriding virtue: it follows the Legislature's command in MCL 8.5.

In one respect, this case is similar to *Booker*. As the Supreme Court pointed out in that case, "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." 543 US at 265. The same is true here. If adherence to MCL 8.5 results in a sentencing system the Legislature does not prefer, the answer is not to violate MCL 8.5, but to allow the Legislature to replace the system with one it does prefer.

## II. Amicus believes the *Lockridge* Court intended to impose a system in which the guidelines range is always advisory. If this is the case, *stare decisis* is no bar to overruling this remedy and replacing it with a bifurcated system.

This Court has asked "whether the prosecutor's application asks this Court in effect to overrule the remedy in [*Lockridge*] and, if so, how *stare decisis* should affect

this Court's analysis." (5/25/16 Order.) Although there is some force to the People's argument that *Lockridge* intended to impose a bifurcated system of the type described above, the Attorney General reads the opinion differently. In the Attorney General's view, *Lockridge* imposed a system in which the guidelines are advisory in *every* case, contrary to MCL 8.5.

The Attorney General recognizes that there is language in *Lockridge* that supports the People's view. For example, it holds, "we sever MCL 769.34(2) *to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt* mandatory," 498 Mich at 364 (emphasis added), and it states that "[*w*]*hen a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury*, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so," *id.* at 391–392 (emphasis added, footnote omitted). Arguably, these could be read to support a partial severance, which maintains mandatory guidelines when guidelines are *not* "scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt."

On the other hand, there is language in the opinion that supports the contrary view. For example, the opinion contains the following statements:

- "We also strike down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure," *id.* at 364–365,

- "Like the Supreme Court in *Booker*, however, we conclude that although the guidelines can no longer be mandatory, . . ." *id.* at 391,
- "[W]e sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)," *id.*, and,
- "To remedy the constitutional flaw in the guidelines, we hold that they are advisory only," *id.* at 399.

These holdings do not appear limited to cases where guidelines are scored with judge-found facts, but by their terms apply to *all* sentencings to which the guidelines apply.

While there are arguments both ways, the Attorney General's view rests on three considerations. First, *Lockridge* intended to adopt the remedy set forth in *Booker*, and *Booker* did not create a sometimes-advisory guidelines scheme. Second, the statement of the holding in the opinion's Conclusion is unqualified: "To remedy the constitutional flaw in the guidelines, we hold that they are advisory only." *Id.* at 399. Third, it seems that if this Court intended to impose a bifurcated sometimes-advisory–sometimes-mandatory sentencing scheme, it would have been more explicit in doing so.

If the People are correct, then *stare decisis* does not enter into the equation, and this Court should simply reaffirm the bifurcated system it imposed in *Lockridge*. If not, then *stare decisis* is a relevant consideration. But for the reasons that follow, *stare decisis* should not prevent this Court from overruling *Lockridge*'s remedy and replacing it with a sentencing system that reflects the Legislature's policy preferences regarding severance as expressed in § 8.5.

### A. Assuming the *Lockridge* Court intended to impose an always-advisory sentencing scheme, that aspect of *Lockridge* was wrongly decided.

When considering overruling a prior decision, "[t]he first question, of course, should be whether the earlier decision was wrongly decided." *Robinson v City of Detroit*, 462 Mich 439, 464 (2000). If, as amicus believes, *Lockridge* imposed an always-advisory system, then this decision was error for the reasons given in Argument I, which need not be repeated here.

If this Court disagrees with either of these points (that is, if this Court agrees with the People that *Lockridge* imposed a bifurcated system, or if this Court believes that an always-advisory system is consistent with MCL 8.5), then there is no need to proceed further with a *stare decisis* analysis.

### B. An always-advisory sentencing scheme does not defy practical workability, which weighs in favor of keeping *Lockridge*'s remedy.

Another factor in deciding whether this Court should adhere to *stare decisis* is whether the prior decision "defies 'practical workability.' " *Robinson*, 462 Mich at 464. Treating the guidelines as advisory in all cases does not defy practical workability, and this is a factor that weighs in favor of *stare decisis*.

### C. No changes in the law and facts exist that undermine the justification of *Lockridge*, which also supports maintaining *Lockridge*'s remedy.

Another factor *Robinson* identified as part of the *stare decisis* analysis is "whether changes in the law or facts no longer justify the questioned decision." 462

Mich at 464. No such changes are present here. The state of the law and the facts is, in all relevant respects, the same now as when this Court issued *Lockridge*.

### D. But the reliance interests in *Lockridge* are not so great that overturning it would work any hardship, and society's reliance on MCL 8.5 should be considered and should weigh heavily against *stare decisis*.

The most important factor in a *stare decisis* analysis (after the threshold question whether the prior decision was wrongly decided) is "whether reliance interests would work an undue hardship" if the prior decision were overruled—in other words, "whether the previous decision has become so embedded, so accepted, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466.

No such dislocations would occur if this Court overruled the *Lockridge* remedy and held that the guidelines are mandatory where judicial factfinding does not occur. First of all, no one bases their conduct on whether the guidelines are always advisory or usually advisory. No one decides whether to commit a crime, or what crime to commit, or how to commit it, based on this question. No contracts are drafted in reliance on one interpretation or the other. The only disruption that would occur is that the bench and bar would need to learn one new thing about post-*Lockridge* sentencing.

And now is the time for that to happen. The bench and bar are constantly learning new things about post-*Lockridge* sentencing. *Lockridge* is, at the time of this writing, not fifteen months old, and its concrete has not yet cured. Published

decisions from the Court of Appeals issue regularly, answering many of the questions neither raised nor answered in *Lockridge*. See, e.g., *People v Garnes*, __ Mich App __; 2016 WL 3909621 (2016); *People v Heller*, __ Mich App __; 2016 WL 3765997 (2016); *People v Campbell*, __ Mich App __; 2016 WL 3765955 (2016). Leave applications are filed, submitting these new questions to this Court, and this Court has held several in abeyance pending resolution of this case. See, e.g., *People v Blevins*, __ Mich __; 2016 WL 5239825 (2016); *People v Shank*, 882 NW2d 528 (Mich 2016). If *Lockridge* imposed an always-advisory system, and if it erred in doing so, now is the time for this Court to correct that error, before any reliance that might set in does so. Further, this is one of the first opportunities this Court has had to address this question. The parties and amici did not squarely raise it in *Lockridge* itself. Although the People and the Attorney General raised the question in *People v Charles Douglas*, No. 150789, the defendant in that case argued convincingly that the question was not properly presented, and this Court declined to address it.[3] 499 Mich 935 (2016).

To the extent any reliance interests are in play here, they weigh against *stare decisis*. "[I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . , that it is to the words of the statute itself that a

[3] Indeed, it is especially difficult to say that there is much reliance on an always-advisory sentencing scheme when there is not even agreement on the question whether *Lockridge* imposed such a scheme. The People do not believe *Lockridge* did so (Pl's Br on Appeal, pp 10–12), the Attorney General does, Steanhouse (correctly) calls it "debatable" and declines to come down one way or the other (Def Steanhouse's Br on Appeal, pp 3–4), and Masroor simply defers to the People (Def Masroor's Br on Appeal, p 29).

citizen first looks for guidance in directing his actions." *Robinson*, 462 Mich at 467. "[S]hould a court confound . . . legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." *Id.* In other words, any reliance interests society might have placed on *Lockridge* are outweighed by the reliance interest society has in MCL 8.5, which *Lockridge* failed to apply. This weighs against *stare decisis* and in favor of a partial overruling of the *Lockridge* remedy.

In sum, while some factors of *stare decisis* analysis weigh weakly in favor of retaining the always-advisory sentencing system *Lockridge* appears to have imposed, the most important factor, reliance interest, weighs much more heavily in favor of overruling *Lockridge* and imposing a sentencing scheme that respects the Legislature's policy choice expressed in MCL 8.5.

## III. *Steanhouse*'s remedy of a *Crosby* remand is not proper, because the sentencing court was aware that it was required to impose a reasonable sentence, i.e., a sentence that was proportionate under *Milbourn*.

Amicus agrees with the People that no remand should occur, but for different reasons. The *Steanhouse* court's *Crosby* remand was based on a false premise—that the trial court was not aware that it was required to obey *Milbourn*. The court believed that it was writing on a blank slate—that *Lockridge* had removed the

standard by which departure sentences are deemed reasonable, and that it was required to determine what the new standard of reasonableness was going to be. Respectfully, the *Steanhouse* court was mistaken. This Court established the test for appellate review of sentences more than 25 years ago, and it has not changed since.

In 1990, this Court adopted the "principle of proportionality" as the test for appellate review of sentences. *Milbourn*, 435 Mich at 650. This test replaced the test this Court adopted in *People v Coles*, which limited appellate review of sentences to cases in which the trial court "abused its discretion to the extent that it shocks the conscience of the appellate court." 417 Mich 523, 550 (1983).

*Milbourn*'s proportionality principle has been part of Michigan sentencing law ever since. After the Legislature adopted sentencing guidelines in 1999, the Court of Appeals held that the new statutory language allowed the review of departure sentences only to determine whether the departure was justified by substantial and compelling reasons, and gave courts "no authorization . . . to further review the overall sentence under the *Milbourn* principle of proportionality." *People v Babcock*, 244 Mich App 64, 78 (2000) (*Babcock I*). This Court, however, corrected that error and reaffirmed that, even in the age of mandatory legislative sentencing guidelines, proportionality remained an integral part of appellate review of sentences. *People v Babcock*, 469 Mich 247, 261–264 (2003) (*Babcock III*). In 2008, this Court reaffirmed that rule in *People v Smith*, 482 Mich 292, 303–311 (2008).

Between *Babcock III* and *Lockridge*, the Court of Appeals repeatedly demonstrated that it was aware that *Milbourn* proportionality review applied to sentences under the mandatory guidelines system. See, e.g., *People v Sherman*, unpublished opinion per curiam of the Court of Appeals, issued November 13, 2014 (No. 317800), vacated in part on other grounds 497 Mich 1025 (2015); *People v Stewart*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2013 (No. 307514); *People v Solernorona*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2012 (No. 299269); *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2012 (No. 302519); *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2010 (No. 286092); *People v Moore*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (No. 267663); *People v Brunt*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003 (No. 234687).[4]

In addition, trial courts were aware before *Lockridge* that *Milbourn* proportionality was to guide their decisions. For example, a pair of Court of Appeals opinions issued just a week before this Court released *Lockridge* quoted language from trial courts considering *Milbourn* in imposing sentences. *People v Campbell*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2015 (No. 321382) (quoting the Kent Circuit Court, imposing an upward departure

[4] Although unpublished opinions are generally considered of no precedential value and minimal persuasive value, amicus submits that these unpublished cases are *more* persuasive in this instance, because they show that not only did the Court of Appeals apply *Milbourn*, but also that it believed application of *Milbourn* was unremarkable.

sentence, as saying, "I'm aware of *People v [Milbourn]*. I believe the sentence I'm going to impose is proportionate. I'm aware of *People v Smith*."); *People v Schwander*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2015 (No. 320768) (quoting the Grand Traverse Circuit Court, imposing an upward departure sentence, as saying, "I emphasize [the facts supporting the departure sentence] only because the principles of proportionality that derive from *Milbourn* recognize that more serious sentences should be for people who not only commit the most serious crimes, but for whom the community should have a reasonable fear.").

For these reasons, although the *Steanhouse* court appeared to believe it was resurrecting *Milbourn* proportionality as the *new* post-*Lockridge* standard of sentencing review, it was not. *Milbourn* was part of the law governing sentences when the Wayne Circuit Court sentenced Steanhouse, and the *Steanhouse* court therefore erred when it held that "the trial court was unaware of and not expressly bound by a reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing." 313 Mich App at 48.

To be fair, *Lockridge* did hold that departure sentences would henceforth be reviewed "for reasonableness," 498 Mich at 365, 392, and it is true that "reasonableness" is not a word to be found in *Milbourn*, in *Babcock III*, or in *Smith*. But the Attorney General submits that it is not this Court's practice to overrule decades of case law and established practice in this manner. The *Lockridge* Court neither ordered nor received briefing or argument on the question of the future

standard of review of departure sentences. Its opinion did not mention *Milbourn* (except to note that it overruled *Coles*), nor did it mention *Babcock III*, nor *Smith*.

In order for *Steanhouse* to be correct in believing it was writing on a blank slate, either (a) the "substantial and compelling reasons" test eliminated by *Lockridge* was the only test for review of departure sentences (which is not correct, as explained above) or (b) the *Lockridge* Court would have had to enact a sea change in the law of sentencing review, overruling 25 years of case law *sub silentio* with no explanation of why the prior law was wrong, no discussion of why the new standard is better (or what it even consists of), no analysis of *stare decisis*, without the benefit of briefing or argument, in a case that did not even present the question.

The better reading of *Lockridge*'s use of the word "reasonableness" is not as a carefully chosen and precisely defined term of legal art, but rather as simply a recognition that the elimination of mandatory guidelines was not carte blanche for trial courts to impose sentences that are either draconian or unduly lenient—in other words, that are not proportionate. Because Michigan law already had a standard, apart from the "substantial and compelling reasons" standard, by which to review departure sentences, and because *Lockridge* said nothing about altering that standard, there is no reason to suppose that standard was overruled.

But even supposing *Lockridge* intended to sweep away *Milbourn*, *Babcock III*, and *Smith*, and create a new standard yet to be defined, remand is still inappropriate. When *Steanhouse* held that reasonableness was to be defined as proportionality under *Milbourn*, it was holding that the old standard was to be

replaced by an *identical* new standard. In other words, it was putting in place the same standard the trial courts used when they sentenced Steanhouse and Masroor. There is no need to remand to learn what the trial courts would have done had they known they were bound by *Milbourn*, because the trial courts *were* bound by *Milbourn*.

## IV. After *Lockridge*, just as before *Lockridge*, departure sentences are reviewed for proportionality under *Milbourn*.

Finally, this Court has asked what the appropriate standard of review of departure sentences is after *Lockridge*. The Attorney General's answer to this question is intertwined with the answer to the previous question. The arguments set forth in the previous section explain fully why *Milbourn* proportionality remains the appropriate standard for appellate review of departure sentences after *Lockridge*, as it was before *Lockridge*.

## CONCLUSION AND RELIEF REQUESTED

This Court should hold, whether as an overruling of *Lockridge* or as a clarification of it, that henceforth sentencing guidelines are advisory in all cases in which the guidelines range is raised using judge-found facts, but remain mandatory as required by statute in those cases in which the guidelines range is reached only using facts found by the jury beyond a reasonable doubt or admitted by the defendant.

It should further hold that nothing in *Lockridge* disturbed *Milbourn* proportionality as the appropriate standard for appellate review of departure sentences.

Finally, it should hold that, because the trial courts below were aware of *Milbourn*, no *Crosby* remand is required.

Respectfully submitted,

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